U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch

Former Owners of Exclusiva Deli Market Llc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0257948

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a Transfer of Ownership Civil Money Penalty (TOCMP) of $22,000.00 was properly assessed against the former owners of Exclusiva Deli Market Llc (hereinafter "Appellant"), for selling or transferring a store that has been permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) in its administration of the SNAP, when it assessed a TOCMP in the amount of $22,000.00 against the Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS."

CASE CHRONOLOGY

The case record documents that FNS permanently disqualified Exclusiva Deli Market Llc, under the ownership of the Appellant, from the SNAP effective February 19, 2019 for trafficking in SNAP benefits. The permanent disqualification letter dated February 15, 2019 stated that if the Appellant/former owners sold or transferred the store after its disqualification, it would be subject to

and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

According to the Bill of Sale on record, on or about July 23, 2021, the Appellant sold or transferred ownership of Exclusiva Deli Market Llc located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new store owner(s) as agreed upon by both the Seller and the Buyer(s) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including the property, inventory/equipment, merchandise inventory, and good will. When the new store owner(s) was authorized to participate in the SNAP on September 12, 2022, the Retailer Operations Division discovered that Exclusiva Deli Market Llc had been sold or otherwise transferred by the former owners/Appellant.

As a result of the sale or transfer of ownership, the Retailer Operations Division notified the Appellant, in a letter dated September 28, 2022, that it had assessed a TOCMP in the amount of $22,000.00 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2), (3), (4) and § 278.6(g) for the sale or transfer of the firm during a period of disqualification.

In a written correspondence postmarked October 6, 2022, the Appellant requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated October 13, 2022 and the assessment of the TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING STATUTE AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(e)(1) states, in part:

> In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) of this section is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil penalty in an amount established by the Secretary through regulations to reflect that portion of the disqualification period that has not yet expired. [Emphasis added.]

7 CFR § 278.6(f)(2) reads, in part,

> In the event any retail food store . . . which has been disqualified is sold or the ownership thereof is otherwise transferred . . . the person or other legal entity who sells or otherwise transfers ownership . . . shall be subjected to and liable for a civil money penalty . . . If the

retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period.

7 CFR § 278.6(g) which provides the steps for calculating the TOCMP, states, in part:

(1) Determine the firm's average monthly redemptions . . . for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
(2) Multiple the average monthly redemption figure by 10 percent.
(3) Multiply the [average monthly redemption times 10 percent] by the number of months for which the firm would have been disqualified . . .

Notwithstanding the above, there is an agency limit of $11,000.00 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

The following may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not fully recapitulated or specifically referenced herein.

In the request for administrative review, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant requests reconsideration of the imposed TOCMP decision pursuant to Section 278.6 of the SNAP regulations.
- Since the Appellant's landlord refused to renew the lease, the company was dissolved on January 18, 2022.
- It was never sold or transferred to anyone else.
- All of the equipment was sold or discarded.

ANALYSIS AND FINDINGS

The purpose of this review is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against the Appellant was appropriate. The disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

The regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against the owner(s) of a disqualified retail food store that has been sold or the ownership is otherwise transferred. The record shows that the SNAP permanent disqualification determination letter dated February 15, 2019, and received by the former store owners on February 19, 2019, included notification to the effect that, "In the event that you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a CMP as provided by SNAP regulations Sections 278.6(f)(2), (3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP regulations at 278.6(g)." Accordingly, the former owners received proper legal notice that a TOCMP could be imposed if the business was sold after the date of disqualification.

The Retailer Operations Division determined that a legal sale of the business did occur and this is supported by documents in the case record. The former owners were properly informed of the TOCMP by letter dated September 28, 2022. The sole issue in this review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a $22,000.00 TOCMP against the former owners.

The SNAP regulations at 7 CFR §278.6(f)(2) do not specify any timeframe in which a store must be sold or transferred following its disqualification for a TOCMP to be imposed nor do they include a requirement as to the basis for the sale or transfer of a previously disqualified store. As noted, there is clear indication in the record that the Appellant firm, or what remained of it, was in fact sold and/or transferred during its period of disqualification. The fact that the retail food business at the stated address is now owned and operated by another entity and that there is a new owner(s) at the same location indicates that this is a legitimate business transfer subject to a TOCMP under SNAP regulations. As such, there is sufficient evidence to support the Retailer Operations Division's determination that a TOCMP as outlined in SNAP regulations at 7 CFR § 278.6(f)(2) was correctly and appropriately imposed against the individuals who owned the business at the time of the investigation and the permanent disqualification. There is no indication in the record that the new owner(s) was involved in any of the violative activity which formed the basis of the firm's previous permanent disqualification, that the new owner(s) is in any way related to the former owners, or that the sale is illegitimate in any relevant respect. Accordingly, the statute and Federal regulations afford no latitude to take any action (including failure to act) other than to impose the sanction at issue. Likewise, this Administrative Review Officer is afforded no latitude to reverse or modify a correct and appropriate administrative sanction.

The case record documents that, under 7 CFR § 278.6(g), the Retailer Operations Division correctly calculated the amount of the TOCMP. That regulation states that the TOCMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the TOCMP may occur only when there is an error in calculation or the amount exceeds the statutory limit. The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was 5 U.S.C. § 552 (b)(7)(E). This amount is more than the agency limit of $11,000 per violation and therefore, the Retailer Operations Division correctly assessed the final TOCMP at $22,000.00 (5 U.S.C. § 552 (b)(7)(E)). The formula for computing the TOCMP does not provide for discretion and is directly related to the amount of SNAP violations, redemptions and the length of time in the disqualification. Therefore, this amount cannot be reduced.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold in a bona fide sale as stated by the Appellant. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is correct. A review of the calculations indicates that the amount of the TOCMP ($22,000.00) assessed by the Retailer Operations Division is also correct. The SNAP regulations are explicit in the requirement for a TOCMP in the event a disqualified business is subsequently sold and/or transferred and there is no Agency discretion in waiving or reducing the TOCMP amount. Thus, the action by the Retailer Operations Division is sustained.

In accordance with the Food and Nutrition Act of 2008, as amended, and the regulations there under, this penalty shall become effective thirty (30) days after delivery of this letter. The Appellant may

contact the FNS Financial Management Accounting Division at 1-703-605-0483 to discuss payment options or follow the instructions in the Retailer Operations Division's letter dated September 28, 2022 regarding online or check payment options.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant resides or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of delivery of this Decision.

Under the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

January 18, 2024